

No. 16509.

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Vol. 3140*

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSEWOOD HOTEL, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the
Tax Court of the United States.

PETITIONER'S OPENING BRIEF.

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A. Statement as to Jurisdiction.

On June 12, 1958, Respondent mailed (by Registered Mail) his "90 day letter" (Notice of Deficiency) wherein he proposed, against Petitioner, deficiencies in federal income and excess profits taxes for the fiscal year ended November 30, 1954 and in federal income taxes for the fiscal year ended November 30, 1955 [Tr. pp. 9-13].

This registered letter was mailed to 3421 West 2nd Street, Los Angeles, California and returned to Respondent marked "Not known at this address" [Tr. p. 18].

On July 17, 1958 Revenue Agent Goddard *personally* served Nathan Stein (officer, director and sole stockholder of Petitioner) with the *same original* "90 day letter" which had, on June 12, 1958, been mailed to 3421 West 2nd Street, Los Angeles, California and returned to Respondent—as aforesaid [Tr. p. 18].

On October 3, 1958 (113 days after June 12 and 82 days after July 17) Petitioner filed its Petition For Review of Deficiency Determination with the Tax Court of the United States [Tr. pp. 3-13 and 38].

On March 20, 1959 the Tax Court entered its order dismissing said Petition "for want of jurisdiction" [Tr. pp. 25-27] and on April 8, 1959 the Tax Court denied Petitioner's Motion for Rehearing [Tr. p. 28].

On May 4, 1959 Petitioner filed its Petition for Review herein [Tr. pp. 29-35].

This Court has jurisdiction to entertain this Petition by virtue of the provisions of Sections 7482 and 7483 of the Internal Revenue Code.

The tax returns in question were filed with the District Director of Internal Revenue at Los Angeles, California [Tr. p. 3] and therefore, under Section 7842 (b) (1) of the Internal Revenue Code the venue for this action is with this Court.

B. Statement of Facts.

Petitioner filed its federal income and excess profits tax returns for the fiscal year ended November 30, 1954 and income tax return for the fiscal year ended November 30, 1955 with the District Director of Internal Revenue at Los Angeles, California [Tr. p. 3].

On June 12, 1958 (within the statute of limitations for fiscal year 1954 because return not filed—after extensions granted—until June, 1955) the Respondent *mailed* (by registered letter) his "90 day letter" proposing deficiencies for the fiscal years ended November 30, 1954 and November 30, 1955 [Tr. p. 3 and pp. 35-37].

HOWEVER, THIS REGISTERED LETTER WAS ADDRESSED AND SENT TO 3421 WEST 2ND STREET, LOS ANGELES AND RETURNED TO RESPONDENT MARKED "NOT KNOWN AT THIS ADDRESS" [Tr. p. 18].

On July 17, 1958, this *same original* letter was *personally* (manually) served on an officer of Petitioner [Tr. p. 18].

Petitioner filed its Petition *with the Tax Court* on October, 3, 1958 [*without knowledge of the attempt*, by Respondent, to serve it by registered mail—Tr. p. 18] believing it was filing its Petition well within the 90 day prescribed period [Tr. pp. 3-13, 18-20 and 38].

The Respondent moved to dismiss Petitioner's Petition "for want of jurisdiction" [Tr. pp. 13-14 and 35-37].

Petitioner opposed the dismissal motion and filed an affidavit in support of its opposition [Tr. pp. 14-16]—*at this time Petitioner was still not aware of Respondent's attempt to serve by registered mail* [Tr. pp. 17-20].

On February 9, 1959 the Tax Court entered its Order of Dismissal [Tr. pp. 16-17].

On March 2, 1959 Petitioner moved to vacate the Order of Dismissal entered on February 9, 1959 [Tr. pp. 17-20].

In this March 2, 1959 motion Petitioner disclosed to the Tax Court:

- (1) Its lack of knowledge of the registered letter;
- (2) The fact it discovered the Respondent's reliance thereon *after* February 9, 1959;
- (3) It was offering to prove that the registered letter of June 12, 1959 was *not* sent to the address of Petitioner *last known to the Respondent*;

- (4) Its position that the Tax Court had jurisdiction because a Petition had been filed with the Tax Court within 90 days of the date Petitioner was *personally* served with the *same original* “90 day letter” [Tr. pp. 17-20].

On March 16, 1959 Petitioner moved for a Los Angeles hearing of its March 2, 1959 Motion [Tr. pp. 21-25].

On March 20, 1959 the Tax Court denied the Motion to Vacate *on the theory that it was immaterial* whether:

- (1) Respondent mailed the registered letter to the alleged wrong address; or
- (2) Petitioner failed to file its Petition with the Tax Court within 90 days of the mailing of said registered letter to the alleged right address.

The Tax Court held, in either event, it did *not* have jurisdiction and did *not* acquire jurisdiction when Petitioner filed its Petition (with the Tax Court) within 90 days from the date (July 17, 1958). Petitioner was *personally* served with the *same original* letter which had been sent (by registered mail)—June 12, 1958—to 3421 West 2nd Street, Los Angeles, California [Tr. pp. 25-27].

Further the Tax Court held that there was no need of a hearing to determine which one of the two (2) reasons precluded jurisdiction [Tr. p. 27].

Petitioner moved for a rehearing on said order and it was denied on April 14, 1959 [Tr. pp. 28-29].

The present appeal was filed on May 4, 1959 [Tr. p. 39].

C. Statement of the Case.

This case presents, for the determination of this Court, the following questions:

- (1) Did the Tax Court err in not granting a hearing for the purpose of determining whether the registered letter of June 12, 1958 was *not* sent to the “last known address” of Petitioner?
- (2) If the only valid service on Petitioner was the *personal* service of July 17, 1958 did the Tax Court acquire jurisdiction when Petitioner filed its Petition (with the Tax Court) within 90 days of said date?

Petitioner contends:

- (1) That it is most material for the Tax Court to hold a hearing to determine if the registered letter was sent to the address of Petitioner “last known to the Commissioner”;
- (2) That the Tax Court acquires jurisdiction if a Petition is filed with it within 90 days of *personal* service of a “90 day letter” which had been previously sent (by registered mail) to a wrong address.

D. Assignment of Errors.

The Petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

- (1) Dismissing, on February 9, 1959, Petitioner’s Petition for Redetermination on the alleged ground that the Tax Court lacked jurisdiction because Petitioner failed to file its Petition for Redetermination within ninety (90) days of the date the statutory Notice of Deficiency was mailed.

- (2) Refusing to vacate said Order of Dismissal after its attention was called to the fact that it was Petitioner's contention that the statutory Notice of Deficiency in question was not mailed to Petitioner's address "last known" to Respondent.
- (3) Refusing to hold a hearing, as requested by Petitioner, to hear evidence offered by Petitioner which would prove that the statutory Notice of Deficiency, in question, was not mailed to the last known address of Petitioner.
- (4) In deciding that it made no difference whether it "lacked jurisdiction" because, on the one hand, Petitioner failed to file its Petition within ninety (90) days of June 12, 1958, or, on the other hand, because Respondent failed to mail the statutory Notice of Deficiency to the address of Petitioner last known to Respondent.
- (5) In deciding that the Tax Court can only acquire jurisdiction in matters of this type if the Commissioner of Internal Revenue sends a statutory Notice of Deficiency to a taxpayer "by registered mail" to taxpayer's last known address. Further, that it cannot acquire jurisdiction where the said statutory notice is "personally served" on taxpayer and the latter within ninety (90) days thereof filing a Petition for Redetermination with the Tax Court.

E. Argument.

I.

The Tax Court Failed to Recognize That the Tax Issue in Question Cannot Be Ultimately Decided Unless It Holds a Hearing and Then Decides Why It Does Not Have Jurisdiction.

If the Respondent mailed the "90 day letter," by registered mail, to Petitioner at its last address known to Respondent then the Tax Court never acquired jurisdiction because Petitioner failed to file a Petition, with the Tax Court, within 90 days of said mailing date.

Under the circumstances, the deficiencies in question would be effective and unreviewable.

However, if the Respondent did *not* send such letter (or deficiency notice) to Petitioner at its last address known to Respondent, then the deficiency notice is void and ineffective. As to the alleged deficiencies for the fiscal years ended November 30, 1954 and 1955 the statute of limitations has now run and Respondent is barred from assessing or collecting the same.

(IN THIS PART OF OUR ARGUMENT WE ARE ASSUMING THE TAX COURT IS CORRECT IN HOLDING THAT SUCH DEFICIENCY NOTICES CANNOT BE SERVED OTHER THAN BY REGISTERED MAIL)

Therefore, as stated by the Court in *D'Andrea v. Commissioner*, 263 F. 2d 904 (U. S. Court of Appeals, District of Columbia—Feb. 19, 1959) it is most important to *Petitioner and Respondent* for the Tax Court to decide whether it lacked jurisdiction because of tardy filing of a Petition in the Tax Court or because Respondent failed to send his deficiency notice to Petitioner at its address last known to Respondent.

Petitioner, in its Motion to Vacate Order of Dismissal [Tr. pp. 17-20] set forth all the basic facts pertinent to the question of the Tax Court's jurisdiction and in its Motion for a Hearing in Los Angeles (and supporting affidavit) it set forth the witnesses who would testify as to those pertinent facts if the hearing requested was granted [Tr. pp. 21-25].

Petitioner respectfully submits that this case should be remanded with directions to vacate the order dismissing the Petition for lack of jurisdiction because of late filing and to hold the hearing requested by Petitioner and then determine whether the "90 day letter" was mailed to Petitioner's address "last known to Respondent"—if not so mailed to enter an order dismissing for lack of jurisdiction because the notice of deficiency (90 day letter) was not legally given.

II.

The Tax Court Erred in Dismissing the Petition for Redetermination for Alleged Lack of Jurisdiction.

The Tax Court is of the opinion that, in order to give it jurisdiction two (2) events must transpire—to wit:

First The Respondent must issue a Notice of Deficiency (90 day letter) by mailing the same to taxpayer's "last known address" by *registered mail*; and

Second: Taxpayer must, within 90 days of the date of mailing such registered letter, file (by mailing) a Petition for Redetermination with the Tax Court.

The denial of the Motion to Vacate Order of Dismissal [Tr. pp. 25-27] clearly discloses that the Tax Court is of the opinion that it cannot acquire jurisdiction if

(1) the Respondent (within the statute of limitations) *personally* serves a taxpayer with a notice of deficiency and (2) the taxpayer files his petition within 90 days of said service.

This Court, in *Boren v. Riddell*, 241 F. 2d 670 (Feb. 19, 1957) held that Congress did not intend that the Commissioner could only serve his Notice of Deficiency *by registered mail*.

In that case this Court clearly decided that such notice could also be served “manually” (personal service) or by “ordinary mail.”

In the present case Petitioner did *not* receive the Notice of Deficiency sent on June 12, 1958, by registered mail. Respondent knew this (when letter returned made “not known at this address”) and, on July 17, 1958, *personally* (or manually) served the same original Notice (or 90 day letter) on Petitioner (who was not aware of the mailing and return of the registered letter).

Within 82 days of such *manual* service Petitioner filed its Petition for Redetermination with the Tax Court.

Petitioner respectfully submits that, within the principles established by the *Boren* case, *supra*, and under Sections 6212 and 6213 of the Internal Revenue Code of 1954 the Tax Court of the United States erroneously decided that it could not have jurisdiction of the present matter.

Petitioner respectfully submits that the case should be remanded with directions to hold the hearing requested by the Petitioner and then determine whether it (Tax Court) does *not* have jurisdiction because the notice was properly sent by registered letter to Petitioner’s “last known address” and Petitioner did not file its Petition

within 90 days of such mailing, or it *does* have jurisdiction because the Notice of Deficiency was finally and properly served *manually* and Petitioner filed its Petition within 90 days of such manual service.

F. Conclusion.

Petitioner appreciates that it is asking for somewhat inconsistent “directions” in the two (2) foregoing arguments but believes that such requests are necessary because of its uncertainty as to whether this Court will follow the Tax Court or the rule of the *Boren* case in its interpretation and application of Section 6212 of the 1954 Internal Revenue Code.

Petitioner respectfully submits that in the light of the facts offered to be proved by the Motion to Vacate Order of Dismissal [Tr. pp. 17-20] and by the Motion For Los Angeles Hearing (and affidavit in support thereof) —[Tr. pp. 21-25] and for the reasons stated by the *D’Andrea* case, *supra*, the case should be remanded to the Tax Court for the purpose of holding the Hearing requested.

After “directing” the holding of such Hearing Petitioner respectfully submits that further “directions” should be consistent with this Court’s decision in the *Boren* case, *supra*.

Dated: Los Angeles, California
October 16, 1959

Respectfully submitted,

JAMES J. ARDITTO,

Attorney for Petitioner.